United States Court of Appeals

for the Second Circuit

APPENDIX

75-1180

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

Docket No.
75-1180

RICHARD HUSS and JEFFREY SMILOW,

Defendants-Appellants.

----------x

APPENDIX
VOL. 2

NATHAN LEWIN
Miller, Cassidy, Larroca & Lewin
2555 M St.
Washington, D.C.

DENNIS RAPPS
66 Court St.
Brooklyn, N.Y. 11201

PAGINATION AS IN ORIGINAL COPY

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Cont'd 73 Cr. Misc. (24)

DATE	PROCEEDINGS
	JEFFREY SMILOW
12-2-74	Filed True Copy of Order from USCA that the judgment of conviction of USDC are hereby confirmed.....Clerk JUDGMENT ENTERED, 12-6-74
3-27-75	Filed: Notice of motion for order providing Kosher Food for deft. Dated: 3-26-75
	Filed: Notice of motion for Reduction of Sentence. Dated: 3-26-75.
4-10-75	Filed endorsed memorandum on Notice of Motion for reduction of sentence Filed 3-27-75--Motion denied. See transcript of 4-1-75. So ordered. GRIESA, J.
4-10-75	Filed notice of appeal from the denial on 4-1-75, on deft's motion for reduction of sentence. (Mailed copies to Govt. & deft's atty.)
4-29-75	Filed transcript of proceedings dated April 1-1975.

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S.D.N.Y. 73 Cr. Misc. (25)

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RAYMOND F. BURGHARDT, Clerk

By _____ Deputy Clerk

D. C. 109 Criminal Continuation Sheet

MCP

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
versus	:	
JEFFREY SMILOW and RICHARD HUSS,	:	73 Cr 24 73 Cr 25
Defendants.	:	

New York, N. Y.

April 1, 1975 - 1:00 p.m.

Before

HON. THOMAS P. GRIESA,

District Judge.

APPEARANCES:

PAUL J. CURRAN, Esq.,
United States Attorney for the Southern District of New York
ROBERT GOLD, Esq.,
Assistant United States Attorney

MILLER, CASSIDY, LARROCA & LEWIN, Esqs.,
2555 M Street, N. W., Washington, D. C. 20037
Attorneys for Defendants
NATHAN LEWIN, Esq., of Counsel

- - -

THE COURT: Now, the first motion which I have before me is a motion for reduction of sentence.

Mr. Lewin, do you have anything to say in addition to what is set forth in the papers, which I have carefully read?

MR. LEWIN: If I might just make two points --

THE COURT: In addition to your carefully written papers?

MR. LEWIN: The only points I would like to make in addition to the papers, your Honor, is to direct your Honor's attention to statements I believe your Honor made at the time of sentencing these defendants, and they appear, I think, at pages 148 and 149 of the transcript, in which I think your Honor stated that you recognize that the purpose of the sentencing in this case was not one of rehabilitation, because it was a unique situation, and it was unlikely that these defendants would ever be again subjected to the kind of situation that really caused, set in track the events that led to this charge and the trial in this court.

I believe your Honor noted at that time that the purpose, the sole purpose, of the sentence was to enforce the law and to vindicate the power of the Court, and it is in that regard that we brought to your Honor's attention the cases on criminal contempt, which we think involved pre-

cisely that policy, which is to vindicate the power of the Court, and we have found no case in which a sentence as substantial as the sentence in this case was sustained was reped in a Court of Appeals decision in criminal contempt situations, even, we submit, where the basis for the defendant's actions, the good faith or state of mind basis for the defendant's actions was far less justifiable and sometimes was far more contumacious than what the defendants did, I think, on even the worst view of the facts in this case.

That brings me to the second matter, which is related somewhat to that but on which I think again your Honor at the time of sentencing stated that you were not sentencing these defendants for anything having to do with the underlying offense alleged to have been committed in the trial or that it was an issue in the trial at which these defendants were to testify.

We submit that if that fact is really laid aside, and we think it should be, because although I note from the transcript of the last hearing on this issue before your Honor, when I was not present but Mr. Rapps was, that your Honor did make some mention of the fact that in your view these defendants were involved in some way in the commission of that offense -- that offense is plainly, we submit, not before your Honor in this case -- that with regard to that

offense in fact there has not been any proof submitted to this Court, and I think your Honor said that that has to be laid totally to one side.

We of course maintain that it is not a proper part of any sentencing to consider what happened in the Sol Hurok bombing in any way with regard to these particular defendant whose only offense that they are charged with in this court is that they wilfully refused to testify in the Federal trial before Judge Bauman, and on that record we submit they are far less culpable in terms of state of mind, in terms of the reason that they give for not having testified than the main defendants, who were defendants in the cases that appear in the footnote in the Chief Justice's opinion in Brown, which they cited, than the defendants for whom the Second Cirtuit reduced the sentence from a year to six months in the Levine case, and consequently we urge your Honor, given those considerations and given the factors that we have outlined in the papers which pertain to the defendants' youth, to their record -- let me just add on in that regard one item referred to in the papers but which we are afraid we did not have at hand at the time I submitted the papers, which is a statement from the City College of New York.

THE COURT: Include it in the affidavit.

MR. LEWIN: That letter from the Dean, from the

acting Dean of the City College indicated that Mr. Smilow, one of the defendants, is first in his class of fifty-four civil engineering students, based on his overall academic record at the present time, and I think this indicates that in many ways a sentence as long as the sentence that your Honor has imposed, which is one year, will not serve society will certainly not serve any rehabilitative purpose with regard to this defendant, and I think it will not serve the Court's ultimate function, which is to enforce the law and make sure that those who areunder orders to testify or order to testify do testify.

These defendants have served nine weeks. Mr. Smilow has served nine weeks, and Mr. Huss served seven, and that in fact some part of the service of that sentence was, as matters turned out, unlawful.

Mr. Smilow's initial few weeks when he refused to testify before the grand jury -- it was ultimately determined only after the case went up to the Supreme Court of the United States that he had been the victim of unlawful wiretapping, that in fact that order directing him to testify was invalid, and the sentence should be wiped off.

But there is no way that you give a man --

THE COURT: Do you suggest that that be credited to him?

MR. LEWIN: I think if it wasn't, it definitely should be.

THE COURT: I assume these men will get credit for any time served; is that right, Mr. Gold?

MR. GOLD: I would assume so, your Honor, but I would like to be heard at length on everything Mr. Lewis has stated to your Honor.

THE COURT: My sentence is a year, and it is up to the prison authorities to determine what credit under their normal procedures is appropriate. I will assume what you are saying is correct, and that they will get credit for time served. But that really is a matter for the Bureau of Prisons, and I am sure you understand.

You may finish your presentation.

MR. GOLD: My understanding is that the nine weeks' incarceration which Mr. Lewis is referring to was not in conjunction with any sentence imposed by this Court for criminal contempt but related solely to the time set by Judge Bauman, stemming from his order of civil contempt, separate and apart from the charge of which these defendants are now convicted.

THE COURT: I think that should be the case. My sentence is for a year, and it was the first time that there was ever any criminal contempt conviction, and I think Mr.

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Gold[redacted] absolutely right, that the prior proceedings were
tempts by way of civil contempt to compel or persuade the d
fendants to do their duty, and that is, I am sure, complet
different, and I think the United States Attorney's office
should probably check with the Bureau of Prisons to see th
that is clarified so that no confusion arises, and you cou
notify Mr. Lewin, and I am sure they will --

MR. GOLD: Yes, your Honor.

THE COURT: The matter should be clarified so Mr
Lewin knows and the defendants know and the Bureau of Pris
knows, and if there is any necessity for any applicat.on o
that score, why, that can be done at a later time. But
we can proceed now with your motion.

Do you have anything else?

MR. LEWIN: No, your Honor. I would just want to
make a brief clarification for the record on that, your
Honor, that I think Mr. Gold is in error to state that all
that time was simply pursuant to the civil contempt. There
was a period of time after the trial had concluded --

THE COURT: That was not any eight or nine weeks.

MR. LEWIN: No.

THE COURT: That is something completely differen
a few days.

All right. This is all a matter for the Bureau o

Prisons.

MR. LEWIN: The reason I raised those first two weeks with regard to Mr. Smilow is because that is time served in prison under an illegal order, which turned out to be so because of a failing of the U. S. Attorney and was very critical.

THE COURT: Do you have any other points?

MR. LEWIN: No, your Honor. I just wanted to say with regard to that point, I think the defendant can be repaid by the end -- be credited with it. The U. S. Attorney says those two weeks was a mistake, it was civil contempt; therefore we are not going to give him that time back.

THE COURT: Any other points?

MR. LEWIN: No.

THE COURT: Is there anything else that anyone wishes to present in favor of the motion to reduce sentence?

All right, Mr. Gold.

MR. GOLD: I want to try to be very brief.

As the Court knows, this has been personally distasteful for me, and, as Mr. Lewin knows, I decided not to submit an affidavit in court in opposition to this motion, but I told him that I would have some remarks to make.

I am troubled by several things that Mr. Lewin has seen fit to argue to the Court. The first is, on the one

hand, he suggests that the underlying case should be given no consideration whatsoever by your Honor. At the same tim he submits an affidavit to this Court -- I am directing the Court's attention to page 2 of the moving affidavit -- where he suggests that the defendants were no more than mere witnesses to his case.

He goes further and suggests that there is no evidence before your Honor that they were anything more than mere witnesses.

I think your Honor ought to consider the fact that these defendants were witnesses and not named as defendants because they were given immunity, and they were given immuni because the Government's position was that each of these witnesses in Mr. Lewin's view, and each of these potential defendants in the Government's view was an eye witness to a case involving a crime which in Judge Bauman's view was nothing less than a murder case.

It is the Government's position, and it is represented in the record at page 47 of the transcript, at which point Mr. Jaffe, the assistant United States Attorney, was putting questions to Mr. Huss, and the questions put to Mr. Huss made clear the Government's position that Mr. Huss was not only an eye witness to the bombing but in fact was one of the individuals who brought the bomb to the particular

Sol Hurok office, where an ensuing explosition killed a youn woman.

That is precisely, I submit to your Honor, what Judge Bauman focussed on when he repeatedly admonished these witnesses that this was not a possession of stolen mail case; this was one of the most aggravated and unusual cases he had ever seen outside of his term of law school or during his time on the bench.

THE COURT: Did any of the answers of Mr. Huss indicate that, or just the questions of Mr. Jaffe?

MR. GOLD: I am coming to that, your Honor. That is precisely the point.

Mr. Lewin now tells us there is no evidence in the record to suggest that they were more than mere witnesses. Your Honor, that fact is precisely the reason why we are in court today. There is no evidence in the record precisely, because these witnesses committed repeated contempts of court. That is precisely what precipitated the charge now pending before your Honor following conviction.

To suggest that there is no evidence on the ground that the Government indeed could produce none is sheer fallacy, and it is misleading, and I think the Court knows it as well.

Mr. Lewin talked about --

MR. LEWIN: Your Honor, I would like an opportuni to respond. Mr. Gold is charging me with being misleading. In that vein I hope I will have the opportunity to reply to that allegation.

THE COURT: Go ahead, Mr. Gold.

MR. GOLD: On the subject of vindicating the power of the Court, I find it utterly inconceivable for the Court to impose a sentence on the defendants in this case with a view to vindicating the power of the Court, totally without focussing on the crime which formed the basis of the case at which these defendants were ordered to testify. This is not a possession of stolen mail case. This is an aggravated case and a refusal to obey the order of the Court in a particular context.

In my judgment and in the judgment of the office I represent, that is precisely what makes the commission of a criminal contempt worthy of vindicating the power of the Court by imposition of sentence. That is exactly the position these defendants are in.

In line with that, your Honor, I would submit that in light of the fact that the co-defendants in that case faced a maximum sentence of more than forty years, a refusal by these two witnesses to testify, thereby terminating that case -- and the record may reflect that there are now papers

filed by Judge Werker articulating the reasons why the U. S. Attorney's office has in the interests of justice decided it had no other course but to seek leave to nolle that case, because it no longer has any live testimony that it can rely on.

I submit that in line with that, your Honor's sentence of one year is an absolute, irreducible minimum, reasonably calculated to vindicate the power of the Court.

I have nothing else to say at this time, your Honor.

THE COURT: Do you have a remark, Mr. Lewin?

MR. LEWIN: Yes, your Honor. Mr. Gold's statements indicate that what he is trying to persuade the Court is to sentence these men with the Hurok offense.

THE COURT: Let's not have any exaggeration. I have read your affidavit. I know what it says, and it does not say Mr. Gold makes a certain argument based on it. I have looked at this just now, and I don't have to hear anything further on this. I can even put my ruling on the record that I am denying the motion for the reduction of sentence for the following reasons:

The sentence as originally handed down was carefully considered on the basis of all the circumstances, including the matters now reviewed before me, and the reasons why I imposed one year imprisonment still stand, and I find nothing

at all in the present submission which in any way indicates that the sentence should be reduced to any degree.

There is, of course, new infomration about the defendants presented now as far as their current activities are concerned, but all of those matters were basically considered at the time, that is, the facts about their academic careers and so forth, and the updating of the materials as far as their personal careers provide.

There is no basis for a change of the basic considerations that went into the original sentence.

I want to make it absolutely clear, and I don't want any confusion to be introduced into the record by Mr. Lewin or in any other way concerning my sentence at the time it was made, and my ruling now is not based upon the events which are spoken of by Mr. Lewin as the underlying events or underlying bombing crimes et cetera. I am not now ruling, and I did not then sentence these defendants for such crimes. That really goes without saying. Any sentence based on the types of crimes allegedly committed would be far more than a year, I am quite certain.

The year's sentence relates to the exact crime of which these defendants were convicted, that is, criminal contempt. However, Mr. Gold is quite right that the Court must consider the nature of the prosecution which these defendan

frustrated and prevented or helped to prevent, and that prosecution was of a very serious nature. It should have gone forward for the protection of society and for the enforcement of the law, and the prevention of that prosecution is a most serious matter and deserves a one-year sentence, to say the least.

And so I considered the nature of that prosecution which was not prosecuted. Whether that prosecution would have succeeded or not I don't know, but at least the Government should have been allowed to go forward with that law enforcemen proceeding.

Now, as far as the culpability and the state of mind, before there was any criminal contempt proceeding brought, the matter had been to the Court of Appeals, and the Court of Appeals had made it perfectly clear that there was no valid ground, religious or otherwise, on which these defendants could refuse to testify. That decision came down. These defendants were apprised of it. They acted in total defiance of that decision. They are citizens of this country, and they acted defiantly and deliberately, in violation of their duties, known duties as citizens.

Now, what distresses me in this picture, among other things, is that there is almost a massive attempt to somehow shield these defendants from any recognition of their guilt.

At the time of the sentence, I received a veritable campaign of mail about them, urging leniency. I received dozens of letters bearing exactly the same language and, in many cases, on exactly the same form.

In connection with this motion, I am receiving, though nothing like the volume I received -- many letters containing the identical language.

I don't assume -- and that is of no great moment to me -- if criminal defendants and their families and their friends want to have mail sent to the Court and letters, they can be on form letters or any other way. It is perfectly okay. But here the sad fact to me is that this massive support, this tremendous amount of mail refusing to acknowled the guilt of these defendants, to me represents a failure on the part of these people to acknowledge the laws of our country and to acknowledge the responsibility of these defend ants and to acknowledge their guilt.

These defendants will have to live their lives. Th best thing their families and friends and lawyers could do for them, the very best thing they could do for them, as in the case of anybody else who has done the wrong thing, is to make them face up to it. It is a cruel deception to hide from them or attempt to hide from them the fact of guilt. That is a disservice to them. I for one won't participate in

that, and if their families and friends really are thinking of their welfare, they will help them see what they have done wrong.

The campaign that has gone on to me is a distressing thing. It is a distressing thing for them. It is a distressing thing for our community, and I am utterly convinced that the motion for reduction of sentence has absolutely no merit, and it is denied.

Now we come to the question about the applications concerning kosher food, and I find in the first place that there are no affidavits from Mr. Huss or Mr. Smilow stating on personal knowledge the bona fides of their actual observance of regulations relating to dietary laws.

MR. LEWIN: We have the defendants in court today. I was planning to have Mr. Smilow take the stand and state his views, and if the Court would like to hear from Mr. Huss -- as I think I indicated in the papers, Mr. Smilow is in terms of observance of kosher requirements more strict in his personal observances than Mr. Huss.

THE COURT: I would not even consider any applications unless I hear from each of them personally. I have no affidavits.

MR. LEWIN: Our purpose in asking for the hearing today is to present evidence to your Honor live today from

UNITED STATES OF AMERICA,

Plaintiff,

- against -

JEFFREY SMILOW and RICHARD HUSS,

Defendants.

73 Cr. 24/73 Cr. 25

MOTION FOR REDUCTION OF SENTENCE

Defendants Jeffrey Smilow and Richard Huss respectfully move this Court for an Order reducing the sentence previously imposed on them, on July 31, 1974, upon this Court's finding that they were in criminal contempt of court for refusing to testify under grants of immunity at the trial of United States v. Stuart Cohen and Sheldon Davis (72 Cr. 778).

The grounds of this motion, as more fully set forth in the attached affidavit of Nathan Lewin, the exhibits thereto and the memorandum in support, are: first, that the rehabilitative and punitive purposes of the sentence could be fully carried out by a substantially shorter term of incarceration; second, that the defendants have shown, by their conduct since the time of sentencing, that they are able to make an affirmative contribution to society in their particular fields of endeavor, and third, that in

/MISC. /MISC.
73 Cr. 24/73 Cr. 25 TPG

UNITED STATES OF AMERICA,

Plaintiff,

- against -

JEFFREY SMILOW and RICHARD HUSS,

Defendants.

NOTICE OF MOTION FOR REDUCTION OF SENTENCE

SIRS:

PLEASE TAKE NOTICE, on the annexed motion and exhibits, the undersigned will move this Court before the Hon. Thomas P. Griesa on April 1, 1975, at 1:00 p.m., or as soon thereafter as counsel can be heard, for an Order, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, for a reduction of the sentences formerly imposed upon said defendants on July 31, 1974, all for reasons more fully set forth in the annexed motion and memorandum in support.

Dated: March 26, 1975

Sincerely yours,

Nathan Lewin
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W.,
Washington, D.C. 20037
(202) 293-6400

TO: Paul J. Curran, Esq.,
United States Attorney for the
Southern District of New York

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Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W.,
Washington, D.C. 20037
(202) 293-6400

TO: Paul J. Curran, Esq.,
United States Attorney for the
Southern District of New York

UNITED STATES OF AMERICA,

Plaintiff,

- against -

JEFFREY SMILOW and RICHARD HUSS,

Defendants.

73 Cr. 24/73 Cr. 25

MOTION FOR REDUCTION OF SENTENCE

Defendants Jeffrey Smilow and Richard Huss respectfully move this Court for an Order reducing the sentence previously imposed on them, on July 31, 1974, upon this Court's finding that they were in criminal contempt of court for refusing to testify under grants of immunity at the trial of United States v. Stuart Cohen and Sheldon Davis (72 Cr. 778).

The grounds of this motion, as more fully set forth in the attached affidavit of Nathan Lewin, the exhibits thereto and the memorandum in support, are: first, that the rehabilitative and punitive purposes of the sentence could be fully carried out by a substantially shorter term of incarceration; second, that the defendants have shown, by their conduct since the time of sentencing, that they are able to make an affirmative contribution to society in their particular fields of endeavor, and third, that in

/MISC. /MISC
73 Cr. 24/73 Cr. 25 TPG

UNITED STATES OF AMERICA,

Plaintiff,

- against -

JEFFREY SMILOW and RICHARD HUSS,

Defendants.

NOTICE OF MOTION FOR REDUCTION OF SENTENCE

SIRS:

PLEASE TAKE NOTICE, on the annexed motion and exhibits, the undersigned will move this Court before the Hon. Thomas P. Griesa on April 1, 1975, at 1:00 p.m., or as soon thereafter as counsel can be heard, for an Order, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, for a reduction of the sentences formerly imposed upon said defendants on July 31, 1974, all for reasons more fully set forth in the annexed motion and memorandum in support.

Dated: March 26, 1975

Sincerely yours,

Nathan Lewin
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W.,
Washington, D.C. 20037
(202) 293-6400

TO: Paul J. Curran, Esq.,
United States Attorney for the
Southern District of New York

them as well as from the rabbis.

THE COURT: You might have saved a little time by presenting affidavits.

MR. LEWIN: I have no problem with that. I just want --

THE COURT: Let's have the testimony quickly, then.

MR. LEWIN: All right. Mr. Smilow, will you take the stand.

SMIL

JEFFREY SMILOW, having first duly affirmed, testified as follows:

DIRECT EXAMINATION

BY MR. LEWIN:

Q Mr. Smilow, would you please state your religious education?

A When I started school, in the first grade, I went to a yeshiva, a Jewish school. I went in a yeshiva to eighth grade. For high school, I went also to a Jewish high school, a yeshiva, too, until twelfth grade. In that school, in the morning you learned religious subjects. In the afternoon you learned English.

Q Could you state, Mr. Smilow, what your personal religious observances are? I won't characterize it. How would you characterize it?

A My personal religious observance -- my home is

UNITED STATES OF AMERICA,

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TO: Paul J. Curran, Esq.,
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UNITED STATES OF AMERICA,

Plaintiff,

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Defendants.

73 Cr. 24, 73 Cr. 25

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light of the defendants' basis for their refusal to testify - a religiously motivated claim - and their youth at the time of the incidents in question, an extended incarceration would not further the ends of justice.

Dated: March 26, 1975

Respectfully submitted,

Nathan Lewin
MILLER, CASSIDY, LARROCA & LEWIN,
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
- against -	:	
JEFFREY SMILOW and RICHARD HUSS,	:	73 Cr. 24/73 Cr. 25
Defendants.	:	AFFIDAVIT IN SUPPORT OF MOTION FOR REDUCTION OF SENTENCE

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

NATHAN LEWIN, being duly sworn, deposes and says:

1. I am an attorney-at-law, admitted to practice in the United States District Court for the District of Columbia and in the courts of New York State. I am a partner in the law firm of Miller, Cassidy, Larroca & Lewin, having offices at 2555 M Street, N.W., Washington, D.C. 20037. I represent Messrs. Huss and Smilow, defendants herein, and make this affidavit in support of their joint motion for reduction of sentence.

2. On July 16, 1974, defendants were convicted on charges of criminal contempt after a two-hour trial before this Court and a jury. On July 31, 1974, this Court sentenced the defendants to a period of one year's incarceration.

3. The history of this case is well known to this Court. Richard Huss and Jeffrey Smilow are young men who were believed by the prosecution to have evidence relevant

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to the bomb explosion that occurred on January 26, 1972 at the offices of Sol Hurok in New York City. At which time they were respectively 17 and 18 years old. Neither defendant in this action was charged as a conspirator or participant in the federal indictment which named four individuals as having committed that offense.

4. Defendants Huss and Smilow were called as witnesses in the federal trial growing out of the Hurok bombing after one of the defendants in that case - whom the prosecution had once viewed as a cooperative informer - refused to testify. Both Huss and Smilow refused to testify, even after a grant of immunity, on various grounds - the one repeated most often being that it would violate their religious principles to provide testimony in that instance.

5. Both defendants were then found to be in civil contempt of Judge Bauman, the trial judge in the Hurok bombing case. During the pendency of their appeal from said civil contempt orders - during which time the Hurok bombing case was recessed - Huss and Smilow were confined to jail. Upon completion of the appeal procedure and the resumption of the Hurok bombing trial, Huss and Smilow were again called to testify.

6. When both defendants again refused to testify - at which time other substantial legal issues in addition to their religiously motivated claims were raised - Judge Bauman signed orders to show cause which formally charged Huss and

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Smilow with criminal contempt pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure.

7. On July 16, 1974, trial was had before this Court. Defendants were found guilty and sentenced to one year's imprisonment.

8. Defendants Huss and Smilow are currently 20 and 21 years old respectively. They are, as reflected in the appended letters to Court, respected and active members in their respective communities. Defendant Smilow is currently completing his third year in a civil engineering program at the City University of New York (CUNY) where he has an exemplary academic record. Defendant Huss is on leave from Staten Island Community College because of the uncertainty of his future. During this period he is employed at his family's furniture store in Staten Island.

9. By their present activities and pursuits as well as from the assertions of those who have petitioned the Court on their behalf (see letters appended hereto), it is clear that both defendants are able to make substantial affirmative contributions to society through their chosen areas of endeavor. To interrupt their programs at this point, for even a short period of time, may frustrate that very progress they have made since their offenses of more than one year ago. Clearly, the ends of justice - i.e. the rehabilitative and punitive purposes of sentence - would be fully carried out by a substantial reduction in the terms of their incarceration.

10. During the pendency of their appeal from their citation by Judge Bauman for civil contempt, both defendants

were imprisoned for a period of nine weeks, at which time they experienced the punitive effects of the prison experience. Aside from the religious difficulties attendant to such incarceration in terms of the unavailability of kosher food and difficulties in properly observing the Jewish Sabbath and holidays, that short disruption interfered with each defendant's personal and religious growth and advancement.

11. Retribution for the defendants' acts will not be mitigated in any way by a lessening of their sentence, since the mark of imprisonment will remain on them and with them regardless of their date of release.

12. Particularly in light of the fact the defendants' acts were motivated by a profound religious belief and practice, rather than out of disrespect for this Court, and in view of the youth of the defendants at the time of those acts, it would appear that a substantially lesser sentence than presently imposed would be in order.

13. A primary goal of incarceration is the prevention of recurrent criminal behavior. Frequently the fear and apprehension of an anticipated prison sentence is adequate to deter a defendant from returning to criminal conduct. The period of fear and apprehension for the defendants and their families has been long. During the period of these proceedings, the defendants have maintained a clear record and have had no further encounters with the law. It is therefore apparent that incarceration in this case is not required to cause the defendants to conform their

conduct to the law.

14. For all the foregoing reasons, together with the letters to this Court appended hereto, it is respectfully requested that this Court enter an order pursuant to Rule 35 of F.R. Crim. substantially reducing defendants Huss' and Smilow's sentences, or in the alternative that those sentences be suspended and they be placed on probation by this Court.

NATHAN LEWIN

Subscribed and sworn to before me this 26th day of March, 1975

Notary Public

HARRY E. YOUTT
NOTARY PUBLIC, State of New York
No. 31-4518011
Qualified in New York County
Commission Expires March 30, 19 75

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA,

Plaintiff,

-against- 73 Cr. 24/73 Cr. 25

JEFFREY SMILOW and RICHARD HUSS,

Defendants.

- - - - - - - - - - - - - - - - - - -x

MEMORANDUM IN SUPPORT OF MOTION
FOR REDUCTION OF SENTENCE

The instant motion is brought pursuant to Rule 35 Federal Rules of Criminal Procedure. It does not challenge the legality of the sentence imposed. Rather, it petitions this Court to exercise its inherent power to re-evaluate the sentence previously imposed upon the defendants in this case, in light of all the facts and circumstances now before it, and enter an order reducing that sentence or placing the defendants on probation.

This Court has sentenced each defendant to a one-year prison term. Counsel for defendants respectfully requests that this Court give substantial consideration to the following factors, and to the reported cases involving criminal contempt, and based upon them, that it reduce the sentences previously imposed.

Defendants are young men, 20 and 21 years of age, who, but for the incident involved in this case, have been leading a responsible life as children, students and community members. Each defendant has an excellent

reputation in his local community and background is unlike that of the usual convicted criminals sentenced to prison terms. For purposes of this motion, that contrast is significant for several reasons.

First, it reveals that unlike those for whom a prison sentence would be appropriate, defendants Huss and Smilow have the positive backing of their families, their religion and their communities upon which to rely for rehabilitative support. Such stability is always considered a strong positive factor in predicting the success of terms of probation.

Second, this contrast relates also to the relative severity of the sentence imposed. To other convicted felons, confinement means that they are not free to go where they please or do what they want. The duration of a sentence therefore becomes important. For defendants Huss and Smilow, on the other hand, confinement for any period means disgrace within those very supportive bodies (family, community and church) which now stand to facilitate their rehabilitation. The same sanction applies whether the sentence is one year long or one month long; the added time only removes from society a useful and contributive member thereof.

Third, prison communities tend to be populated predominantly with those who have the more typical felon profile. A person of either defendant's background stands apart. As a consequence, daily life in prison, without the social support of fellow inmates, is rendered more

difficult and hence is a relatively harsher form of punishment.

In assessing the suitability of a one-year term, this Court should take two other concerns into account:

First, this Court must consider that the defendants were not prompted in their conduct by any motive of personal gain. The religious ground for their refusal to testify - which they personally emphasized time and again at the apparent expense of the more legally substantial claim of unconstitutional surveillance (even to the point where the latter were deemed waived by the Court of Appeals), has been brought to this Court's attention many times. The Court has indicated, however, that it also views these defendants as implicated in the incident that caused a death at the offices of Sol Hurok and Columbia Management. There is, of course, no showing that these defendants were involved in any way other than as witnesses to deeds that others committed. Even if there were, however, such proof would not rebut the fact that no personal gain of any kind has been sought by these defendants. If anything they did was misguided and unlawful - and they now recognize it was - they did it out of a strong feeling for their people and for the survival of their brethren around the world. The law's majesty must be recognized and enforced, but Draconian measures may not be the suitable means on this occasion.

Second, this is not a case of criminal contempt involving "deliberate violation unattended by mitigating circumstances." United States v. Levine, 288 F.2d 272, 274 (2d Cir. 1961). In the Levine case, the Second Circuit cited with approval the listing of criminal contempt sentences in the late Chief Justice Warren's dissenting opinion in Brown v. United States, 359 U.S. 41, 58 n. 11 (1959). In that enumeration, the refusals to testify "during the course of trial" (viewed as most severe by the late Chief Justice) were punished with sentences of 8 months (and a $750 fine); 90 days and a $1,000 fine; 6 months; and 30 days. The opinion observed that the only sentence as extreme as one year had been reversed. Ibid.

In the Levine case itself, the mitigating circumstances (fear of reprisal) justified the appellate court's reduction of the sentence from one year to six months. The defendants in this case present at least as good a case for "mitigating circumstances", as did Levine. We do not emphasize it, but there is in this record some suggestion of possible reprisals, and the defendants' sincerity of religious convictions and the absence of any possible personal gain - as well as the defendants' youth - point up the extraordinary severity of a one-year term.

Finally, we note the contribution that defendant Smilow is able to make to society if he is permitted to continue his studies. He has devoted himself entirely to serious advancement in his chosen field of professional

endeavor, and the attestation from the dean of his school shows how successfully he has performed. All these factors make this a strong case for reduction of sentence.

CONCLUSION

For the foregoing reasons, this Court should exercise its authority under Rule 35 of the Federal Rules of Criminal Procedure to reduce the sentence of the defendants.

Dated: March 26, 1975

Respectfully submitted,

Nathan Lewin
MILLER, CASSIDY, LARROCA &LE
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, :

-against- : 73 Cr. 24/73 Cr. 25

JEFFREY SMILOW and RICHARD HUSS, :

Defendants. :

----------x

March 6, 1975
4:35 p.m.

BEFORE: HON. THOMAS P. GRIESA,

District Judge

APPEARANCES:

PAUL J. CURRAN, ESQ.
United STates Attorney for the
Southern District of New York
BY: ROBERT GOLD, ESQ.,
Assistant United States Attorney

DENNIS RAPPS, ESQ.
Attorney for defendants.

(Case called.)

THE COURT: What do we have on the Huss and Smilow?

MR. RAPPS: Your Honor, this is an application for an order that Mr. Huss and Mr. Smilow be permitted to have kosher food during the period of their incarceration, including the provision of food acceptable during the period of Passover, which has special dietary needs.

THE COURT: Would you describe to me what that means?

MR. RAPPS: The first part or the second part?

THE COURT: I want to know the details of what the requirements are for Passover and what the requirements are after that.

MR. RAPPS: Your Honor, during the period of Passover that these requirements would pertain would be for a period of eight and a half days. This would mean that there are certain foods that could be eaten. Those foods would be limited to those not having any content containing leavening.

THE COURT: Wait a minute, what is the period of Passover?

MR. RAPPS: The period of Passover is from March 20th until April 3rd.

THE COURT: I am not clear. You say there can

be no foods having leavening?

MR. RAPPS: Yes, your Honor.

THE COURT: What would that mean; regular bread would not be included?

MR. RAPPS: Bread, cakes. The ingredients that would be prescribed are not limited to bread, pertaining to bread. There are certain other foods.

For example, as I say, cakes, certain types of candied fruits and certain types of vegetables.

THE COURT: How is the prison going to accomplish this; do you have ideas on that?

MR. RAPPS: I understand that there has been some discussion about it and extension of the time after --

THE COURT: What's your understanding about that, you are not applying for that?

MR. RAPPS: I had not intended to apply for that.

THE COURT: I had a telephone call at noon fro the Congessman from the district and I believe he called Mr. Curran, but you are the lawyer on the case and after all the Congressman, I am sure, trusts the lawyer on the case to mak the necessary applications.

MR. RAPPS: Your Honor, I just want to say for the record I was not aware of the initiation of the phone ca

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THE COURT: How were the calls initiated?

MR. RAPPS: I understand someone from the family --

THE COURT: Who from the family?

MR. RAPPS: I am not aware of that, your Honor. I just don't know. I know that I was called by somebody from the Congressman's office saying that the calls were made and to see if some consideration --

THE COURT: Do the defendants know how the calls from the Congressman initiated?

MR. RAPPS: They are in the courtroom, your Honor.

THE COURT: What is your application?

MR. RAPPS: Let me phrase my application. We are primarily concerned with the provision of food that is in accord with the orthodox Jewish requirements for the defendants.

THE COURT: Have you got any suggestions about how a prison is going to carry out this request? And I will say right now, that I cannot require something of the prison that is impractical.

Now, you suggest how these requirements are going to be carried out.

MR. RAPPS: I might suggest that on the one hand, that the prisoners might possibly be placed in an

institution where the food would be readily available from the outside.

THE COURT: What is such an institution?

MR. RAPPS: I understand this has been done on prior occasions in the West Street facility.

THE COURT: Where have they been placed?

MR. RAPPS: At this point I think Mr. Gold has indicated that he is not aware of where they would be placed.

THE COURT: If you come in with an application you have to support the application. You are coming in and dumping this problem on me and there are ways that you can find out what can be done.

MR. RAPPS: Well, your Honor, I had requested information from Mr. Gold as to where they would be placed.

THE COURT: Is anything preventing you from calling the warden of a prison? Have you tried to do that?

MR. RAPPS: My understanding is that this was attempted on prior occasions at the West Street facility with one of the defendants and that was unavailing and as a matter of fact --

THE COURT: Who did it? Who made the call?

MR. RAPPS: There was a gentleman named -- I believe -- this all happened so quickly, but I believe his name is Rothenberg. He is somebody who is very interested in

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this problem.

THE COURT: What interest does he have?

MR. RAPPS: He is working on some compilation of instances where these things have occurred.

THE COURT: Who is Mr. Rothenberg?

MR. RAPPS: He has no additional capacity.

THE COURT: Does he represent the defendants?

MR. RAPPS: At that time I don't believe so.

THE COURT: Has any representative of the defendants called any prison authority to find out how the dietary matter can be taken care of?

MR. RAPPS: Not to my knowledge, your Honor.

THE COURT: You haven't even tried?

MR. RAPPS: Well, your Honor, I was brought into this not more than thirty-six hours ago.

THE COURT: You were brought into it to take care of the dietary matter?

MR. RAPPS: To deal with this problem in light of the fact they have represented to me that they have had a problem in the past during the prior periods of their incarceration and as a matter of fact your Honor issued an order in July of '74 as I understand, dealing with this problem, but that was not dispositive of the issue that has been represented to me.

What we were simply interested in, your Honor, is some direction from the Court that all reasonable means would be undertaken to secure and to provide for the defendants' dietary needs in light of their -- which I believe their right of free exercise of religion under the First Amendment --

THE COURT: Look, I don't mean to be giving you a hard time, which I probably am, but I must say that I just can't help but observe that there is a tremendous effort to take care of the dietary problems of these two men and it is a little bit ironic in view of the crimes which they participated in.

They are all supposed to take great care about the dietary laws, but some woman was killed as a result of the activities of these two young men.

MR. RAPPS: Well, your Honor --

THE COURT: And that, I think, is just a moral matter which they should hear and you should hear, as everybody else who wants to hear it can hear. Do you understand that?

MR. RAPPS: Yes, your Honor.

THE COURT: I want to -- no matter what anybody has done, I want them to be able to observe their religion and I am going to do what I can to take care of that, but there is

strenuous effort -- I appreciated the call from the Congressman this noon, but I must say that I think for somebody in the family to be even calling a Congressman, it is an exaggerated step.

Once the Congressman is called he obviously wants to do his duty by the constituents, and that's fine, but we have courts that pretty much take care of these matters and I assume you are somewhat embarrassed by that, and that's okay.

Now, I told the Congressman on the phone that I have no objection to having the surrender date delayed until after the completion of Passover. Is it Passover?

MR. RAPPS: Yes, your Honor.

THE COURT: During Passover there are special restrictions which don't apply at other times and the sentence -- the surrender date has been delayed so long now that it certainly is of no significance to have it delayed another month.

So when is Passover completed?

MR. RAPPS: Sundown, April 3rd.

THE COURT: So the surrender will be -- what do you say, Mr. Gold?

MR. GOLD: Your Honor, lest there be any confusion I would like to clear this up on the record.

Mr. Rapps advised me prior to your hearing this application that apparently there was a misunderstanding about the U.S. Attorney's office's position with respect to the adjournment of the surrender date. Mr. Rapps is apparently under the impression that the U.S. Attorney's office did not and does not oppose that application. That is not the case.

I was present in Mr. Curran's office this morning and his instructions to me and his instructions to the Congressman were that as a matter of course we would opp this adjournment as much as the mandate issued forthwith from the Second Circuit on February 21, 1973, in what I regard to be an excess of consideration given the facts of this case --

THE COURT: An excess of consideration by whor

MR. GOLD: By the U.S. Attorney's office. I d not notice them for the usual surrender in one week or two days, but noticed them for surrender on March 10th, which is slightly more than three and a half weeks, which in and of itself is more consideration than is extended to the average defendant who has to surrender in Room 506 following convic- tion.

Now, if your Honor, in the exercise of dis- cretion, is inclined to move the surrender date back until April 3rd, I would oppose that for the reasons stated, but I

wanted the record to be especially clear that that is not a matter in which the U.S. Attorney's office acquiesces at this point.

THE COURT: When I talked to the Congressman I told him that I would extend it because to me it has no particular significance. I ordered these people remanded last July.

MR. GOLD: Yes, sir.

THE COURT: And they got a stay from the Court of Appeals, although there really wasn't any real applicable question. The matter was affirmed from the bench as I understand it.

MR. GOLD: By summary order, yes, sir.

THE COURT: My view is I just want to avoide complications and I don't think if we now rush to incarcerate these people during their Passover, we just will be involved in more of what we are involved in today, which is groups of people suddenly becoming aroused about this problem, which I think we don't need that.

Now, I will then required your surrender on April 5th, which gives plenty of time -- no, April 4th. They will have to surrender April 4th and that may have to be at an institution out of the state. They will either surrender here at the other location at a time on April 4th which I

will discuss.

You still have the dietary problem even after Passover, but that's a little simpler, is it not?

MR. RAPPS: Yes, your Honor.

THE COURT: What are the dietary requirements?

MR. RAPPS: May I digress for one moment? I don't have a calendar. April 3rd, I don't know what day of the week that is.

THE COURT: April 3rd is a Thursday and April 4th is a Friday.

MR. RAPPS: And the 4th is Friday. I don't know the procedure as to how when somebody surrenders --

THE COURT: I am thinking of having the surrender at Ashland, Kentucky.

MR. RAPPS: I think that would be physically impossible, your Honor.

THE COURT: It's up to them. I will permit t surrender at the institution I think they will go to, but i they don't want to surrender there, they can surrender at W Street.

MR. RAPPS: I have no conceptual problem with that.

MR. GOLD: I am not privy to the information that your Honor is privy to. It was my understanding they

would not be incarcerated together, but if your Honor understands they will be incarcerated in Ashland, Kentucky --

THE COURT: Mrs. March checked with the probation department and apparently before they were either on their way to Ashland or scheduled to go to Ashland, but you indicated that they would not want to surrender in Ashland, right?

DEFENDANT SMILOW: You see, Passover is on --

MR. RAPPS: Would you like to hear from them, your Honor?

THE COURT: Sure.

(Pause.)

MR. RAPPS: I think, your Honor, Mr. Smilow has indicated from his experience it takes some time for the surrender to be accomplished and Friday -- there is a limit on Friday in terms of the onset of the Sabbath, so that if -- I hesitate to ask that it be on Monday in light of your Honor's graciousness, but I think that all the problems would be resolved if he were to be able to surrender either on Sunday or Monday. I suppose --

THE COURT: You are going to be in prison on Sabbaths all through the year.

DEFENDANT SMILOW: But there is always complications downstairs in this place and by the time they get me

to the place it may take the whole day and I may get there late in the evening.

THE COURT: I think I confused things. I was under the impression that one of you, when I ordered you remanded before, you had arrived at Ashland, am I mistaken?

/ DEFENDANT SMILOW: One of us got to Ashland, the other didn't.

THE COURT: You are Mr. --?

DEFENDANT SMILOW: Smilow.

THE COURT: Who got to Ashland?

DEFENDANT HUSS: I did.

THE COURT: Why don't you come up, Mr. Huss.

Then the stay of the Court of Appeals occurred, right?

DEFENDANT HUSS: Yes, sir.

THE COURT: Where were you at the time the Court of Appeals granted the stay, Mr. Smilow?

DEFENDANT SMILOW: I was in Petersburg, Virginia.

THE COURT: Okay.

DEFENDANT SMILOW: On the way to Ashland.

THE COURT: Oh, you were on the way to Ashland?

DEFENDANT SMILOW: Yes, it takes a long time.

THE COURT: I think -- you see, there is a provision which is being used now where people can surrender

directly to the institution where they would be held and that is sometimes desireable for a number of reasons instead of surrendering at a local jail and then having the transfer problem and it is particularly helpful where there isn't any federal detention center and where all there is locally is a city jail.

Here we do have a detention center. I thought that if it was reasonably certain that they would both be going to Ahsland, I thought that we might simplify the dietary problem by having them surrender directly to Ashland. They might have a little easier facilities than West Street, but again I think we are just turning handsprings over this and I probably am going too far.

I think what I will do is to delay the surrender until April 4th, but I think that the surrender should be in the courthouse at 10 a.m., April 4th, and we will let the prison authorities make the necessary movements.

Now, let's go back to the question of the dietary laws that will pertain after Passover. Can you explain that to me?

MR. RAPPS: Yes, your Honor. During the year the general requirements are, as a general matter, that the food be of a kosher variety; that they not contain unkosher elements or ingredients. Now, generally raw fruit, salad --

these are acceptable. However, the problem that's arisen as in the past, as I understand it, is that these foods were available in limited quantity, but meats were not available, meats that were either -- meats known as kosher, which are those that have undergone ritual slaughter, and animals that have been secured -- animals that have been ritually slaughtered and also from animals that are of a kosher variety.

For example, pig meat is unacceptable, however slaughtered. Meat from a cow is acceptable, only if the cow had been ritually slaughtered. This is generally available in large metropolitan areas with, I suppose, large Jewish populations.

Now, the arrangements that have been made in the past, as I understand it, is that pre-packaged foods have been made available to certain prisoners, but only on a very irregular basis, if at all, and what we would suggest is that -- I don't know whether this is feasible, but if they would be made available on a regular basis, that the prison authorities would be required to make a comparable diet available to these prisoners on a regular basis and --

THE COURT: Where has this been done?

MR. RAPPS: I understand on occasion it has been done in the West Street center.

THE COURT: It is probably easier in New York.

MR. RAPPS: I think so.

THE COURT: The information I was able to get, and again, I wish you had made more of an inquiry, but the information I was able to get indicated to me that what has to be done is that the people -- they just cannot have two sets of food and what has to be done is if a particular meat is not acceptable to someone of a religious faith, they just have to refrain from that mean and eat more of other things. That is about as good a thing as I can come up with. It is not my information that at most of these institutions they can have special foods and there is no way I can require them to and there is no constitutional religious right to have special foods and they really have to select what they can eat out of the things that are available to them.

That may mean foregoing certain of the meat dishes.

MR. RAPPS: Your Honor, that's precisely the point. Those defendant have been sentenced to one year and what would be involved is not eating meat for a full year.

THE COURT: There is certainly fish available. There is poultry. They can eat fish and poultry, can they not?

MR. RAPPS: That's the problem. Poultry also has to be slaughtered in a certain way and certain fishes are not permitted, certain fish that have certain characteristics

are not permitted. It is a very involved procedure, I admit, your Honor, but also the problem of the cooking. Yo see, now, potatoes, for example, while there is no prohibition in the Jewish religious law about eating potatoes, but potatoes that were cooked in pots that had previously contained, for cooking purposes, meat that was unkosher, they would not be permitted to eat those potatoes either or anyt cooked in those utensils. It is a very involved procedure and it appears that we are not trotting out all these thing to make a point, but this is really the fact of life and wh

THE COURT: I don't think you are trotting anything out, but I think -- now, what have orthodox Jews d in the past when they have been in these institutions? How did they get along?

MR. RAPPS: I think it presented a major prob lem. When they weren't able to make arrangements with a friendly guard or a friendly person in theprison kitchen, t had to do without many things and I can't say personally th I know of people who have suffered -- their health have suffered, but I would imagine that must have been the case. I mean, we are living in 1975 and as your Honor has demonstrated, there is much more sensitivity to peoples' needs at this point, even those convicted of very serious crimes, but I would only refer your Honor to the case of Barnett v.

Rodgers in which the Circuit Court -- the District Court of Colombia Circuit Court in a case involving the dietary requirements of black Muslims -- I understand they are also unable to eat meat containing any pork product -- that the Court said -- set up the test that their dietary needs, which are based on religion, could not be unmet unless there was a compelling state interest to the contrary.

THE COURT: What's the law in this Circuit?

MR. RAPPS: I don't believe, and Mr. Gold can correct me, I don't believe there is any case in point in this Circuit.

THE COURT: Mrs. March has read that case, and obviously knowing has been briefed before me and I wouldn't expect it, but I am informed that the case holds that the prison authorities cannot infringe upon religious beliefs of the black Muslims in connection with food, except in the case of a compelling state interest and they held that the administrative necessities of the prisons were a compelling state interest and if we are wrong on our memory of the case, why, you certainly correct me, but that is as much information as I have on a quick basis.

MR. RAPPS: It's been so long since I read the case, but that wasn't my point. My point in raising it is that is precisely what your Honor was leading to, what precisely

could be done in order to provide for these needs and it seems to me that the provision of T.V. Dinners, or something, which I agree with might be out of the ordinary, but I think is administratively possible, especially in an area like New York.

THE COURT: I think you have to to think of this. There are prisoners there that aren't getting T.V. Dinners and I am not sure if it would be very seemly for two young men to be singled out to get food of a different quali which I think it would be, than the other people there, and that's a problem.

So I think we better work along -- I think I can delay the sentence, because I don't see any reason to hav any undue complications during the Passover because of this a I gather without knowing a lot about it that there are very strict requirements during Passover and so that's really not a matter of great consequence to hold off sentence -- surrend until April 4th. After that I really can't -- on the basis o what I know now I can't really issue any special requirement to the prison authorities.

In the first place, I don't have any materials before me in the way of any legal authorities. Secondly, I don't have any research or inquiry by you as to what can or cannot be done. My own very quick inquiry this afternoon

indicates that it would be difficult to make special provision, if not impossible, so I really don't have a basis now on this kind of speculative presentation which you have made, and I don't say that critically, at all, but it is just a fact I have to deal with.

I don't have any basis for entering an order. Indeed, I rescind my prior order because I think that that was done quickly and it was done without an appreciation of the problem and I don't -- I rescind it simply because I don't know now how it can be put into effect. So I am not going to issue an order or hold in effect an order which I don't have any idea of how it can be practically made effective.

So, my order of July 31, 1974 is rescinded. You are free, if you feel strongly enough about this, if between now and April 4th you want to come back to me with an application which is based on some inquiry and some -- where you can help me in figuring out something practical I will be happy to hear you, but that's the best I can do.

MR. RAPPS: Your Honor, may I just state that I appreciate that your Honor has just ruled, but I would simply like to state for your information that this has been done on a number of occasions at the West Street facility. In fact, there is one prisoner, I believe his name is Stuart Cohen, who received this kind of meal in the West Street facility

for approximately five and a half months.

THE COURT: These men will not be at the West Street facility the whole year. That's the thing. I certainly hope they are not. They ought not be at West Street for the year. I don't think the Bureau of Prisons would dream of keeping them there a year.

MR. RAPPS: I must confess ignorance as to the procedure, but I must say it is physically feasible --

THE COURT: You are talking about West Street? Now, let's -- I will tell you, you came in here in a hurry and you are at perfect liberty to call the Bureau of Prisons to try to find out where these people will be and find out what facilities they have, or anything else you want to do.

Now, I would suggest to you -- you sort of keep it in balance and you not, you know, create too much work about this, but if this is a matter of importance to you and your clients, why, something can be done beyond what's been done here, but I believe I have no basis for ordering prison authorities to do something at some location that I don't know the men will be at and I don't have the faintest idea of what facilities they have for cooking or obtaining these special foods.

I cannot enter an order. I cannot keep the order in effect that I made on July 31, 1974. We have gotten to the

point of repeating ourselves, but that's where we stand.

MR. RAPPS: Your Honor, I just simply would state that, as I said before, it was our position from the outset that under the First Amendment that the prisoners would be entitled to -- under the free exercise clause, would be entitled to an accommodation to their religious needs.

THE COURT: The best information I have is from my law clerk, who seems to have an accurate memory of the one case that's been specifically mentioned here, and it does not hold your way.

Now, if you have any other cases you can state them.

MR. RAPPS: I think it was a factual --

THE COURT: Look, you are at liberty. If you want to go into this further, you can come in and I don't think we can really go any further on this.

MR. RAPPS: Thank you, your Honor.

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